IN THE SUPREME COURT OF ZAMBIA **SCZ/8/103/2014**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

DORA MPOKOTA **APPELLANT**

AND

HARRISON MUKUTU **RESPONDENT**

Coram: **Hamaundu, Wood and Malila, JJS**
On 23rd January, 2017 and 14th February, 2017

For the Appellant: N/A

For the Respondent: Mr. K. M. Simbao - Messrs Mulungushi Chambers

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J U D G M E N T

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *University of Zambia Council v. Jean Margaret Calder (1998) ZR 48*
2. *Sentor Motors Ltd. and 3 Others Companies (1999) SJ*
3. *Zambia Seed Company Ltd. v. Chartered International (Pvt) Ltd SCZ/20/1999*
4. *Infinity TV limited v. Chamba Valley Rose Gardens Ltd, Oddys Works Ltd, Odyssseas Mandenakis and Commissioner of Lands ZR (2) 2011*
5. *Stanley Mwambazi v. Morrester Farms Limited (1977) ZR 108*
6. *Water Wells Limited v. Jackson (1984) ZR 98*

7. *D. E. Nkhuwa v. Lusaka Tyre Services (1977) ZR 43*
8. *Saviour Chibiya v. Crystal Garden Lodge and Restaurant Limited Appeal No. 97 of 2013*
9. *Access Bank (Z) Limited v. Group Five/ZCON Business Park Joint Venture, SCZ/8/52/2014*

The parties to the present motion have been enmeshed in legal proceedings for nearly a decade now, the action having been commenced in November, 2008. The proceedings have been bedeviled by lapses and much delay at every turn from commencement through to the present motion, which lapses and delays are attributable largely to the appellant and her counsel.

The facts giving rise to the claim are reminiscent of the story of the Arab and the Camel. The respondent was the registered owner of the property known as Plot No. 04 Block 180, George Compound, Lusaka, which originally belonged to his father who died in 1985. The respondent's case is that before his demise, the respondent's father had allowed the appellant's father to occupy a cottage on the said property while he occupied the main house. He later moved to another house, leaving the appellant's father to collect rentals on his behalf from the tenants of his property and remit it to him. Following the demise of the respondent's father, the property remained

unoccupied. The appellant's father subsequently vacated the cottage, but to the bemusement of the respondent, the appellant, without any colour of right whatsoever, effected extensions to the said cottage which she was then occupying, converting it into a five roomed structure and erecting a boundary wall around it. She claimed ownership of the plot on which what was previously a cottage, was situated.

The respondent, who has held an occupancy licence in respect of the property since 1990, alleges that the appellant had no right to remain in occupation of the property or any part of it. The claim against the appellant in the lower court was essentially for vacant possession and mesne profits.

The proceedings in the lower court started on a precarious note, the action having been wrongly commenced by way of originating summons. Given the contentious nature of the evidence and the issues that fell to be determined, the learned lower court judge granted the respondent indulgence, and thus treated the action as if it had been commenced by way of a writ of summons.

The appellant opposed the respondent's action. She put up a robust defence only to later realise that it required further fine tuning. The defence was subsequently amended with the leave of court.

The appellant maintained in her defence in the lower court that she was entitled to block 06/180 George Compound where she had always lived with her father; that there was no relationship between her father and the defendant's late father under which her father was permitted to stay in the servant's quarters. Her point was that Lusaka City Council had records showing that while her father occupied Plot 06/180 George Compound, the respondent's father occupied Plot 04/180 George Compound and that if there was any error in the numbering of those two properties, the respondent was at liberty to take that issue up with the Lusaka City Council, the issuer of Occupancy Licences.

After a shaky start with the pleadings as we have explained already, the lower court eventually set the matter down for trial on 18th May, 2012. On that day, however, Counsel for the appellant was not ready to proceed and thus applied for an adjournment which was

granted to the 7th August, 2012. On the 7th August 2012, counsel for the appellant was not present and neither was the appellant in person. The court proceeded to hear the matter in the absence of the appellant and her counsel. It received the testimony of one witness, who should have been only the respondent's first witness, and adjourned the matter for cross-examination.

Almost predictably, the appellant's counsel did not appear on the adjourned date, prompting the court to give yet another adjournment. Again there was no appearance on the part of the appellant or her counsel on the return date and no reason was preferred. The respondent thereupon opted to close his case without calling any other witness. Submissions on behalf of the respondent were received by the court and, unsurprisingly, not from the appellant or her counsel. Based on the evidence before her, and assisted by the submissions made by counsel for the respondent, the learned trial judge delivered her judgment on 6th August, 2013. She found for the respondent, holding that the claim had been proved. She ordered the eviction of the appellant and damages against her to

be assessed by the Deputy Registrar. The respondent was also awarded costs.

A month later on 6th September, 2013, the appellant issued summons to set aside judgment and, contemporaneously, filed an application to stay execution pending the application to set aside judgment. She explained the reason for counsel's failure to attend the trial of the matter, averring that counsel who had conduct of the matter had left the firm for which he laboured while it held her retainer. She also pleaded that she had a defence on the merits and sought to be given an opportunity to cross-examine the respondent's sole witness now that she had engaged another lawyer, so that the court could determine the matter on the merits.

The court heard the parties' representations on the application. In a ruling given on the 10th of April, 2014, the learned High Court judge dismissed the appellant's application to set aside judgment and discharged the order of stay which she had earlier granted. The court was of the opinion that the reasons given for the appellant's failure to attend court were neither sufficient nor convincing and that, in any case, the appellant did not disclose any defence on the merits

and, therefore, that her quest to cross-examine the respondent's sole witness would be an exercise in futility as it would not elicit any new information relevant to her case.

Unhappy with that ruling, the appellant filed a notice of appeal on the 7th May, 2014 together with a memorandum of appeal, setting out three grounds upon which the trial court's judgment was to be impugned.

According to the appellant, she waited in vain for the record of proceedings from the High Court to enable her prepare the record of appeal, until the time prescribed for filing the record had expired. She contended that the learned High Court judge should not have heard the matter in her absence as she deserved to be given an opportunity to cross-examine the respondent's witness.

The technical lapses and avoidable inattention that afflicted the appellant's efforts to have the record filed and the appeal settled for hearing became even more evident when, on 6th August, 2014, the appellant filed summons for extension of time within which to file the record of appeal. At the hearing of that application on the 14th

October, 2014 before a single judge of this court, the appellant's counsel was reminded that he had filed a wrong application as what should have been filed was an application for leave to file the record of appeal out of time, rather than an application for leave to extend time within which to file the record of appeal. This prompted the learned counsel for the appellant to withdraw the 'erroneous' application. He made a fresh application to file the record of appeal out of time on the 20th April, 2015. That application was scheduled for hearing on the 9th of June, 2015. Not unexpectedly, counsel for the appellant did not yet again appear before the court on the scheduled date. The application was struck off the active cause list with liberty to restore within thirty days or else the appeal would stand dismissed. The appellant's counsel only managed to file the summons to restore barely hours before the lapse of the thirty days given in the order restoring the matter, i.e., on the 8th July, 2015. Through the supporting affidavit, counsel explained his absence on the 9th June, 2015 when the trial of the matter commenced, which explanation the single judge found satisfactory and accepted. The matter was restored to the active cause list when the application to restore was heard on the 20th August, 2015.

Even then, lapses or misfortune continued to dodge the appellant's heel in her quest to have the record of appeal completed and filed. By 14th September, 2015 no record had been filed, prompting the parties to settle a consent order wherein it was mutually agreed that the appellant would file the record of appeal within thirty days from the date of the order. The terms of that consent order too, were not adhered to by the appellant who failed to file the record of appeal within the time stipulated in the order. On the 21st October, 2015 the appellant once more filed summons for leave to file the record of appeal out of time. The application was stoutly resisted by the respondent.

After considering the affidavits of the parties and hearing the arguments by the parties' learned counsel, the learned single judge of this court was of the view that the application was not only lacking in merit but was also irregularly before her. In her view, since the parties agreed through the consent order that the record would be filed within thirty days, the appellant could not now look to the court to review the period agreed in the consent order after that period had expired. The single judge reasoned that in any case, the appellant

should have come to court before the time stipulated in that consent order had elapsed.

Secondly, the single judge was of the view that a consent order can only be varied with the consent of both parties. Short of agreement by the parties to vary the consent order in question the appellant had to commence a fresh action to set aside the order. The learned single judge relied on the following authorities:

- **University of Zambia Council v. Jean Margaret Calder**[1]
- **Sentor Motors Ltd. and 3 Others Companies**[2]
- **Zambia Seed Company Ltd. v. Chartered International (Pvt) Ltd**[3]
- **Infinity TV limited v. Chamba Valley Rose Gardens Ltd, Oddys Works Ltd, Odysseas Mandenakis and Commissioner of Lands**[4]

The learned single judge accordingly dismissed the application prompting the appellant to take out the present motion under Rule 48(4) and (5) of the Supreme Court Act, chapter 25 of the Laws of Zambia.

Written heads of argument were filed on behalf of the appellant on 20th May, 2016. Her contention, in a nutshell, is that the single judge dismissed the action on a technicality, which technicality was constituted by two factors namely; that, first, having regard to the

thirty days within which to file the record of appeal agreed to in the consent order, the appellant could not now come to court to review or vary the date after the time had expired, and second, a consent order can only be varied with the consent of both parties. The appellant relied on article 118(2)(e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 which provides that:

> **"in exercising judicial authority, the courts shall be guided by the following principles:**
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> .....
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> .....
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> .....
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> **(e) justice shall be administered without undue regard to procedural technicalities....."**

The appellant beseeched us to uphold the motion.

The respondent filed his heads of argument on the 11th January, 2017. He basically supported the finding of the learned single judge regarding her circumscribed power in view of the consent order. The respondent's counsel also submitted that the appellant was wrongfully blaming the High Court Registry for a matter that could have been attended to had the appellant properly taken heed of the time set out in the consent order. It was finally submitted that the

fact that the appellant was a widow is, in the present circumstances, irrelevant. We were urged to dismiss the motion with costs.

At the hearing of the motion on the 23rd January, 2017, there was no appearance from the appellant or her counsel while Mr. Simbao appeared on behalf of the respondent. Given the procedural history of this matter, which we have captured earlier in this judgment, we were not surprised that there was no appearance for the appellant. Upon satisfying ourselves from the court clerk that service of the notice of hearing was effected, we were content to hear the respondent. In doing so we took into account all the document filed by both parties in aid of their respective positions.

Mr. Simbao for the respondent, indicated that he was placing reliance on the heads of argument and the affidavit opposing the motion.

We have considered the position of both parties with interest. We think that the motion is without merit and should be dismissed, not for the reasons that the single judge gave in her ruling, but because the manner in which the appellant and her counsel have

handled this matter has been uncharacteristically fraught with avoidable lapses, inattention and tardiness. The history of the matter, as we have set it out, reveals demonstrable casualness, an unbelievable degree of laxity and a blatant disregard of the rules of procedure on the part of the appellant's learned counsel, and general nonchalance which can only react against the appellant.

While we maintain the position we have consistently articulated in many cases including **Stanley Mwambazi v. Morrester Farms Limited**[5] and **Water Wells Limited v. Jackson**[6] that it is desirable for matters to be, as much as possible, determined on their merits and in finality rather than piece meal and on technicalities, we are also mindful of the guidance we gave in **D. E. Nkhuwa v. Lusaka Tyre Services**[7] that:

> **"The rules of court must *prima facie* be obeyed in order to justify a court in extending the time during which some steps in procedure require to be taken. There must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."**

In **Saviour Chibiya v. Crystal Garden Lodge and Restaurant Limited**[8], we stated as follows:

"It behoves an intended appellant to comply strictly with the rules of this court. It is time counsel practicing in this court went back to the basics and reacquainted themselves with the rules regarding the documents necessary for mounting an appeal and what to do when an amendment becomes imperative. We would be shirking in our responsibility as the last court of the land if we fail to stop parties who appear before us from using their own lapses and inefficiencies to contradict the spirit of expedition in the fair and just conclusion of appeals which is a core value of our justice system."

The appellant has pleaded in the submissions filed on her behalf that she is a widow who has lost two houses already due to this matter not being determined on the merits. We are bound to sympathise with any misfortune the appellant may be in, whether as a consequence of these proceedings or not. Her plea is, however, not a legal argument and the law remains blind to issues extraneous to the dispute and the questions to be determined. The court only sees with judicial eyes.

In our judgment in **Access Bank (Z) Limited v. Group Five/ZCON Business Park Joint Venture**[9], we reviewed a plethora of authorities regarding when we have and when we have not dismissed an appeal for non- compliance with rules of procedure. We do not intend to engage in a similar exercise here. Suffice it to recall what we stated

in that case that each case will be decided on its own peculiar circumstances and that judicial discretion will, as usual, play an important part in determining the justice of the case. We also remarked that:

> **"It is in the even-handed and dispassionate application of the rules that courts can give assurance that there is a clear method in which things should be done so that outcomes can be anticipated with a measure of confidence, certainty and clarity. This is regardless of the significance of the issues involved or questions to be tried."**

Regarding the argument that article 118(2)(e) should be viewed as directing us to have no undue regard to technicalities, we note with profound interest that the appellant has laboured to convince us that the decision of the learned single judge was on technicalities and this entitled her to the benefits envisioned in article 118(2)(e) of the Constitution. We have stated already that the learned single judge dismissed the application for extension of time because, in her view, granting it would amount to reviewing, or varying the consent order which, on authority, can only be set aside or varied by either the consent of the parties or through a fresh action commenced for that purpose. This to us is an exposition of the law as the learned single judge understood it. It is not a technicality but a

determination of substantive legal questions. Even if we were to accept the appellant's contention that the ruling of the single judge was on a technicality, we can do no better than quote what we stated in **Access Bank (Z) Ltd v. Group Five/ZCON Business Park Joint Venture**[9] that:

> **"We do not intend to engage in anything resembling interpretation of the constitution in this judgment. All we can say is that the constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."**

We agree with the law on setting aside a consent judgment as set out in the authorities quoted and discussed by the learned single judge in her ruling. Whether the same principle applies to a consent order regarding an interlocutory matter as was the case here, is however, a different issue. We believe there could be room for distinguishing a consent judgment or order that determines a matter in finality and one on an interlocutory point. It is beyond debate that a fresh action ought to be commenced for purposes of setting aside a consent judgment which extinguishes a cause.

We think, however, with respect, that the learned single judge well missed a fine point here. The consent judgment that had been settled by the parties directed that the appellant files her record of appeal within thirty days from the date of the order. Thirty days elapsed and the appellant still failed to file the record of appeal. In our view, the purpose of the consent order not having been satisfied, the consent order lost its currency on the thirty-first day following its settlement. It became ineffective and only retained historic value. At the time of the appellant's second application to file the record of appeal out of time was made, there was no virtual consent order to talk about which could any longer affect the rights of the parties and which could, subject to the caveat we have given, be a subject of setting aside through a fresh action commenced for that purpose. In our view, with the consent order having become literally a dead letter, there was nothing that could have stopped the appellant from filing an application in the manner that she did, granted that the application was made outside the effective period covered by the consent order. Rule 12 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia which allows the court to entertain applications for extension of time even after the lapse of the time prescribed in the

rules or an order, is instructive in this regard. The approach by the learned single judge presupposed that the consent order was still effective, valid and actively governing the rights of the parties. That was a misdirection.

Given what we have already stated regarding the conduct of the appellant and her legal counsel, the motion fails, and it is dismissed with costs.

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E. M. Hamaundu
SUPREME COURT JUDGE

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A. M. Wood
SUPREME COURT JUDGE

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M. Malila SC
SUPREME COURT JUDGE